Supreme Court of the United States

October Term, 1954

No. 552 Misc.

JOE APPLEBAUM and BERTRAM E. SIMMS, a Partnership, dba CENTER AMUSEMENTS,

Petitioners,

versus

PARAMOUNT PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION, UNIVERSAL FILM EXCHANGES, INC., UNITED ARTISTS CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, LOEW'S INCORPORATED, COLUMBIA PICTURES CORPORATION, REPUBLIC PICTURES CORPORATION, PARAMOUNT-RICHARDS THEATRES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals, For the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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April 20, 1955.

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On Petition for a Writ of Certiorari to the United States Court of Appeals, For the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A of Petition) is reported at 217 F. 2d 101. The opinion of said Court on Petitions for

Rehearing in the same cause is not reported officially or unofficially but appears as Appendix B to the Petition.

JURISDICTION.

The juirsdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

(1) Is it reviewable and reversible error for a Court of Appeals to set aside the verdict of a jury in a case in which the undisputed facts establish that the jury was influenced by (a) a friend of one of the Plaintiffs, (b) others not parties to the case, (c) information as to compromise and offers of compromise by the Defendants not admitted nor admissible in the record, and (d) other extraneous matters?

(2) Is it reviewable and reversible error for a Court of Appeals to set aside the verdict in a case in which the Trial Court (a) granted a lengthy, argumentative theory instruction prepared by Plaintiffs' counsel; failed to grant Defendants' properly tendered instructions; and granted special instructions for Plaintiffs followed at some length by directly contradictory instructions for Defendants on an important issue in the case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitutional and statutory provisions involved are set forth in the Petition at pp. 3-5.

STATEMENT OF THE CASE.

A. On The Merits.

Petitioners' statement of the case should be amended and amplified:

The Center Theatre was 3/4 of a mile east of Greenville (R. 3167); in addition to first-runs it obtained second-runs, subject to only 30 or to 21 days' clearance; the estimate of the daily operating expense of the theatre set forth on page 8 of the petition at $33.79, was only Applebaum's first estimate and was by him amended to $38.99 (P-213,[1] R. 2166).

Shortly after his bankruptcy in 1934 (R. 962), Applebaum began to manage his wife's theatre—the only one in Hollandale (pop. 1800). This was sold in January, 1945, for $25,000 (D-1, R. 972) of which $15,000 had to be paid to the Federal and State Governments on account of a 5-year delinquency in admissions and income taxes (R. 1065). During construction of the Center, Plaintiffs issued "insufficient funds" checks to a painter, to a plumber, and to the watchman (D-14, R. 1044; D-15, R. 1044; D-16, R.

[1] For brevity Plaintiffs' exhibits are designated as (P-1) et seq., and Defendants' (D-1) et seq.

1044), for a total of $507. During its operation Plaintiffs issued approximately 200 "insufficient funds" checks (D-214, R. 2263; D-216, R. 2271; D-286, R. 5245; D-290, R. 5252). At its opening, the venture owed at least $141,-823.25 (P-188, R. 1948) to mortgagees, installment sellers and unpaid laborers and material men.

Loew's and Universal had had no business dealings with Paramount Gulf since 1942, and 1938, respectively (R. 3837-42; R. 4818-20), and during Plaintiffs' operation Columbia did not sell any pictures to it (R. 4392). Loew's sold second-runs to Center, granted reductions on 10; received, beginning in May, 1947, "insufficient funds" checks (D-173, D-108, D-185, R. 1444, R. 1303, R. 1464); and was required frequently to demand box-office statements and remittances (D-172, R. 1443; D-174, R. 1445; D-175, R. 1445; D-176, R. 1445; D-179, R. 1449). Universal sold second-runs (P-93, R. 759), advised Applebaum he could bid against Lake for first-run (P. 34, R. 577), but all were awarded to Lake. 15 days after Center opened Universal received an "insufficent funds" check for film rent (P-109, R. 792); it frequently requested box-office reports on its pictures (P-108, R. 792); and granted Applebaum so many reductions he expected a refund on every picture (R. 1411-12).

Columbia sold to Lake and Center (R. 4392), and did not sell to Paramount Gulf (D-258, R. 4157); it received an "insufficient funds" check (D-132, R. 1379); and could not obtain box-office statements from Center (R. 4397).

United Artists, Warner and Paramount continued to do business with Paramount Gulf and Lake. All sold sub-

runs to Center and United Artists offered to and did spot-book pictures to the Center (R. 610; P-127, R. 838); Paramount received an "insufficient funds" check (R. 1212).

RKO put up its pictures for bidding among Lake, Center and Paramount (P-59, R. 679). Center obtained 3 first-run with 30 days' clearance over second-run, for which it paid $10.44, $27.50 and $26.00, respectively. Fox ceased negotiations with Paramount Gulf in January 1947 (R. 4102-03) and did not renew them until July (R. 4104). In the meantime its films was put up for bidding between only Center and Lake, Center obtaining 13 first-runs (D-146, R. 1439). Fox made requests for box-office statements (D-149, R. 1420; D-153, R. 1421; D-150, R. 1420; D-148, R. 1418) without response.

Representatives of Respondent distributors who had the ultimate decision on the licensing of pictures in Greenville testified that there had been no consultation or discussion among them as to which theatre should be licensed by them respectively and each acted upon his own independent judgment, without any joint action with any other distributor or exhibitor.

Although the theatre was booked through December, 1947 (D-199, R. 1803) in September the installment collector for some of the equipment demanded payment of a 4-month arrearage (D-24, R. 2008) and shortly after the last show on October 10, 1947, began to remove the seats (R. 940).

Center was required to pay the installment collectors at the rate of $1675.92 per month upon theatre debts,[2] or at the rate of $53.30 per day (R. 2288-91). Applebaum claimed he enjoyed good business (R. 913) on first run exhibition, and grossed $107.29 per day (Pet. p. 8). After the payment of film rent and the theatre's estimated operating expenses, only $9.59 (R. 2056) would be available for the installment collectors, leaving a deficiency of $43.71 per day of first-run exhibition.

Other factors in the record of the trial upon the merits are that during the examination of a witness about the middle of the trial, on July 10, 1951, Plaintiff Applebaum winked at Juror Rockwood, and the juror pleasantly smiled back (R. 3673). The Court observed the incident, promptly dismissed the jury for the day, dictated his findings, and issued a reprimand to Applebaum (R. 3673). Defendants' motion at that time for a mistrial was denied (R. 3702-3). This denial was included among the grounds for a new trial (R. 5745). On three occasions, when the jury was excluded, Plaintiffs sought to introduce evidence concerning the RKO compromise and the Court refused to admit it. (R. 626, 628, 944, 1977, 1983). Nevertheless, through outside means, several of the jurors learned about this compromise as shown in (d) of Section B of this Statement.

B. On Motion For New Trial.

Testimony was taken on Defendants' Motion for New Trial (R. 5763-5941). Though the District Judge over-

[2] The bowling alley and fountain lounge had their own installments to meet; the popcorn concession was in the names of Plaintiffs' spouses. (R. 1078.)

ruled the Motion (R. 5942), he found the following as facts in his Letter Opinion (R. 5943-5955):

(a) During the trial, some juror stated in the presence of Juror Guido and others that these Defendants had offered $100,000 to Plaintiffs in settlement. Guido expressed amazement and the other juror said that he had it on "good authority" (R. 5784).

(b) While driving alone about two[3] or three months before the end of the trial, Juror Guido was hailed and stopped by Sam Freedman, a friend of Applebaum. Freedman said, "If you can take care of my friend Applebaum, I will appreciate it." Guido tried to silence him but Freedman further said, "Well, maybe it will be worth while to you." Guido replied, "You are talking to the wrong man" (R. 5787-8).

(c) Juror Liddell lived in Natchez. During the trial he made two trips to Greenville (R. 5802, 5805) where he lodged in the home of Ben C. Penn, Sr., whose adopted son is a brother of Liddell's wife. Penn was a witness for Plaintiffs (R. 3377-94). Liddell saw the theatres in Greenville on his trips (R. 5811). Penn made two visits during the course of the trial to Liddell and his family in Natchez (R. 5808). Liddell spoke to some of the other jurors concerning his trips to Greenville.

(d) Juror Delaughter was told by Liddell that Columbia had paid $10,000 in compromise (R. 5835).

[3] The trial ended August 30th. This would fix the time of the incident at about the same time as the winking episode between Applebaum and Juror Rockwood.

When his authority for the statement was questioned, Liddell replied that "a little bird told him" (R. 5835). Liddell discussed this settlement with two or three other jurors (R. 5877). Later on, it was determined that it could not have been Columbia but actually was RKO (R. 5877-8, 5836).

(e) Juror Rockwood heard discussions among the jurors that the defendants had offered to compromise for $75,000 (R. 5833). He also heard a conversation to this effect between two strangers in the Jitney Jungle Cafeteria (R. 5824).

These facts were concurred in by the Court of Appeals.

ARGUMENT.

Petitioners seek a review of a judgment of the Court of Appeals which remands the case for a new trial as against all Respondents (except Republic, for which judgment was ordered entered) and which is, therefore, interlocutory and non-final in character. (No complaint is made by Petitioners as to Republic's dismissal.) The Court of Appeals reversed the cause because of errors which, by their nature, are not likely to occur on a new trial. Because of the peculiar facts involved and the extensive evidence, this litigation is of concern to only the immediate parties. No important Federal question is involved.

1.

It is not reviewable and reversible error for a Court of Appeals to set aside the verdict of a jury in a case in which the undisputed facts establish that the jury was influenced by (a) a friend of one of the Plaintiffs, (b) others not parties to the case, (c) information as to compromise and offers of compromise by the Defendants not admitted nor admissible in the record, and (d) other extraneous matters.

A.

Petitioners present five questions for review, none of which states a matter decided by the Court of Appeals, and each of which magnifies a single factor or circumstance so that factor or circumstance appears to be the gravamen of decision. The first question would indicate that the Court of Appeals held that the jury was influenced solely by the residence and nature of the parties and "that there is no indication of such influence other than the favorable verdict." The Court did truly remark that the local individuals were let out (217 F. 2d 101, 122). At the time of the suit they resided, respectively, in Greenville (R. 5157-3033) and Bay St. Louis, Mississippi (R. 4546-2988). Plaintiffs resided in Washington County (Complaint R. 5), then in the Division from which the jury was chosen. Juror Liddell lodged twice in the Greenville home of Plaintiffs' witness Penn. Penn visited in the juror's Natchez home (pp. 106, 217 F. 2d). Two other jurors visited Greenville during the trial (pp. 114-117, 217 F. 2d. R. 5845, 6). Even before Applebaum was dismissed as the first witness, Liddell tried to persuade

juror Delaughter to his view (pp. 112-113, 217 F. 2d) and Applebaum was, or became, sufficiently acquainted with juror Rockwood to wink at him and receive a pleasant smile (R. 3673).

But the circumstances of residence were not the gravamen of decision. The conversations, the corrupt approach of Freedman, the information of RKO's compromise and of offers in compromise by Defendants derived from extraneous sources, and the actual facts of contact and communication between Plaintiffs' witness and the juror (found to be facts by the Trial Court,[4]) are the bases of decision:

> "We feel therefore that the record as a whole justifies the conclusion these extraneous matters had a substantial influence, prejudicial to defendants, in producing the verdict in this case. For these reasons the lower court should have set the verdict aside and ordered a new trial." (217 F. 2d 101, 122.)

Thus, there is no conflict of decision with *United States v. Scophony Corporation*, 333 U.S. 795 (1948), or *Burnrite Coal Briquette Co. v. Riggs*, 274 U.S. 208 (1927), nor with Amendment VII to the United States Constitution; nor is there conflict with *United States v. Sorcey*, 151 F. 2d 899 (1945) which states that Courts "must not permit the integrity of the jury to be assailed by mere suspicion and surmise." Here undisputed facts found by the Trial Court condemn the verdict.

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[4] The facts as found by the Trial Court and concurred is by the Court of Appeals in footnotes 6 and 7, pp. 106-7 of 217 F2d.

Petitioners complain (p. 15 Pet.) that the Court of Appeals said:

> "The solution of this question does not require a positive finding that the jury was actually influenced by what took place; but rather involves a determination as to whether or not it was made reasonably certain that they were not." (Citing many cases, including two cases from this Court.)

But that extract is not in conflict with any of the decisions cited by Petitioners. It is, in fact, in perfect harmony with the decision in *Mattox v. United States*, 146 U.S. 140 (1892), and in *Remmer v. United States*, 347 U.S. 227 (1954), in which latter case this Court said that any private communication with the jury is "deemed presumptively prejudicial, and the burden is thereby cast upon the party in whose favor the verdict is rendered to show that it was not so influenced." (P. 229.) Indeed, the burden rested heavily on Plaintiffs; and all that they say is that Freedman's approach was "ambiguous," and nothing about the extraneous information operating upon the jury, nor about Applebaum's wink and the juror's smile. The Court of Appeals, however, did make such positive findings.

B.

The Court did not hold that a different measure of proof applies in the recovery of a penalty. While it characterized the treble damage provision as penal,[5] even though

[5] This characterization is consonant with the opinions in *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27 (1916), wherein Mr. Justice Holmes referred to "a penalty of triple damages", and with *Commissioner of Internal Revenue v. Glenshaw Glass Company and William Goldman Theatres, Inc.*, No. 199, March 28, 1955 (pp. 1, 3, slip opinion) wherein this Court referred to two-thirds of the recovery under the Clayton Act as "punitive".

convinced that the evidence of conspiracy was "weak" and impressed with Appellants' argument that Applebaum's venture "was foredoomed to failure because of its financial structure, location and the method of operation" (217 F. 2d 127) it did not order judgment for defendants (except Republic) but remanded the case for a new trial, regardless of such weakness of evidence of conspiracy and lack of evidence of causal connection. It did not apply a higher degree of proof to the action.

C.

Petitioners' third question implies that the Court of Appeals did not positively find that the jury was actually influenced by extraneous matters. The Court of Appeals did upon the whole record positively so find. (P. 101, 217 F. 2d.)

2.

It is not reviewable and reversible error for a Court of Appeals to set aside the verdict in a case in which the Trial Court (6) granted a lengthy argumentative theory instruction prepared by Plaintiffs' counsel; failed to grant Defendants' properly tendered instruction; and granted special instructions for Plaintiffs followed at some length by directly contradictory instructions for Defendants on an important issue in the case.

A.

The Court of Appeals did not condemn Plaintiffs' 10-page "theory" instruction simply because it was prepared

by partisan counsel. On that basis no "theory" instruction could ever be given. This particular argumentative, unfair, theory instruction was held bad by the Court because it was not "judicial". It was "one-sided", "argumentative", "written by partisan counsel in the nature of an argument" (217 F. 2d. 101-123) and should not have been granted "in the form presented" (124).

Some of the innumerable bases for these conclusions of the Court of Appeals were such statements as "defendants control such a large proportion of the available motion picture films as to amount to a monopoly," a plain misstatement of the law, the announcement of Plaintiffs' "willingness and ability to pay rental equal to or higher than that of their competitors" (R. 5409) in the face of the "insufficient funds" checks and the absolute lack of evidence of ability to pay; and its statement that Plaintiffs' theatre "was in every respect equal or superior to any other theatre in that City" (R. 5408-9) in spite of the mass of testimony to the contrary (e.g. Plaintiffs' witness Hollowell's estimate that the Paramount Theatre was worth several times the cost of Center (R. 2839)).

Further, the Trial Court failed "fairly and correctly" to cover the issues tendered by Respondents, hence Petitioners can derive no comfort from the opinion of the Tenth Circuit in *Thiringer v. Barlow*, 205 F. 2d 476 (1953). In other words, the Trial Court made a strong argument for Plaintiffs and none for Defendants.

B.

Plaintiffs' Instruction 63 (R. 5442) stated that each distributor Defendant was under a duty to offer every other equally suitable theatre at Greenville an equal opportunity to negotiate for its films. To the same effect were Instruction Nos. 55 and 56 (R. 5441). Said Instructions deny the basic right of a distributor to select its customers. *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953).

There is no conflict between the holding of the Court of Appeals and the decision in *Ball v. Paramount Pictures*, 176 F. 2d. 426 (1949). On a former appeal in that case (169 F. 2d 317 (1948)) the Third Circuit had already found that appellees had violated the Anti-Trust Acts. On the appeal in 176 F. 2d, the Court was concerned with the formulation of an injunctive decree. It is axiomatic that "in such decree equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole." *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 724 (1944). In the instant case the evidence of conspiracy was weak and the evidence of causation most questionable.

Petitioners seek to counteract these prejudicial instructions by pointing out that the Court granted four special instructions for Defendants (R. 5483-4), but the Court of Appeals properly pointed out that the Defendants' instructions were 40 pages after the prejudicial in-

structions, and that these respective instructions are "completely contradictory in substance"; and the contradictory sets of instructions resulted in additional confusion in the minds of the jurors (p. 125, 217 F. 2d).

There is no conflict between the opinion of the Court of Appeals and the Seventh Circuit in *United States v. Harris*, 211 F. 2d 656 (1954), which states that "it must be presumed that the jury conscientiously observed the instructions of the Court." It is impossible for a jury to "conscientiously observe" two mutually contradictory sets of instructions. Fundamental error is committed where instructions on a material issue are contradictory. *Deserant v. Cerillos Coal R. Co.*, 178 U.S. 409 (1900).

C.

Petitioners refer to 28 U.S.C. 2111, Rule 61, Federal Rules of Civil Procedure, and *Palmer v. Hoffman*, 318 U.S. 109 (1942), which deal with errors which do not affect "substantial rights of the parties." None of these authorities changes "the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." *McCandless v. United States*, 298 U.S. 342 (1936) (emphasis by the Court). Erroneous instructions on vital issues are "presumptively injurious" and affect the substantial rights of the parties. *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919).

3.

Republic

Since the petition does not assert error in dismissing the action against Republic, it should, in any event, be dismissed in respect of Republic.

4.

Other Ample Grounds.

Respondents have the right to urge the other ample grounds upon which the Court of Appeals should have reversed the judgment. *Langnes v. Green*, 282 U.S. 531, 535-9 (1931); *Walling v. General Industries Co.*, 330 U.S. 545-7 (1947).

If the unusual and shocking conduct of the jury had not so engaged the attention of the Court of Appeals, and if the contradictory and prejudicial instructions had not so plainly contributed to the verdict, the cause would have been properly reversed because of the weakness of proof of conspiracy, or because of the lack of proximate causation of damage to a "venture * * * foredoomed to failure" because of its own inherent defects (217 F. 2d 101-127). Further, the judgment should have been reversed in view of the inconsistency of the verdict in favor of the individual Defendants but against three Respondents which did business only with the individual Defendants and with Plaintiffs.

We submit that the minimum relief to which Respondents were entitled was a reversal and remand as granted by the Court of Appeals.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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Counsel for Respondents.

CERTIFICATE OF SERVICE.

I, Earl T. Thomas, one of the Attorneys of, and of counsel for, the Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of April, 1955, I served true copies of the above and foregoing Brief for Respondents in Opposition on Petitioners, by mailing on said date such true copies respectively in duly and properly addressed envelopes, with first class postage prepaid, to Petitioners' respective attorneys, as follows:

To: Walter P. Armstrong, Jr., Esq.,
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Memphis, Tennessee;

To: Jerome S. Hafter, Esq.,
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Greenville, Mississippi; and

To: Landman Teller, Esq.,
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Vicksburg, Mississippi.

This April 20th, 1955.

EARL T. THOMAS,
Attorney and of Counsel for
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